



ASSOCIATION OF AMERICAN RAILROADS

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Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: STB Docket No. FD 35557, *Reasonableness of BNSF Railway Company Coal Dust Mitigation Tariff Provisions*

Dear Ms. Brown:

The Association of American Railroads ("AAR") submits this letter in reaction to the Joint Appeal filed in this proceeding by the members of the Western Coal Traffic League ("Appellants"). The Appellants have sought review of a decision by the Director of the Office of Proceedings served on February 27, 2012 ("Director's decision") subjecting Appellants to discovery in this proceeding. In their appeal, Appellants argue that the Director's decision is detrimental to the public interest in subjecting members of a trade association to discovery requests in a proceeding where the trade association is a party. Appellants assert that the Director's decision "...if not undone—will have significant chilling effects on the continued public participation by WCTL and other trade associations in proceedings before this agency." Joint Appeal at 2.

As a trade association that represents its members in proceedings before the Board, the AAR is compelled to address Appellants' assertions as to the likely response of trade associations to the Director's decision. The Appellants' argument that trade associations will be inhibited from participating in Board proceedings is without foundation. The determination of whether a third party discovery request should be granted in this proceeding or in any other Board proceeding is not dependent upon whether the third party is a member of a trade association but whether it is not unduly burdensome for the third party to search for and produce information and/or documents that are potentially relevant to a proceeding before the Board. Congress granted the Board authority under 49 U.S.C. § 721 (c) to issue subpoenas to non-parties in a proceeding in such circumstances.¹

¹ The AAR does not intend to address in this letter whether or not the subpoenas meet the tests in these circumstances. That issue is left for the parties to address.

Contrary to the assertion of the Appellants, third party discovery is not an extraordinary remedy nor is the issuance of a subpoena “unheard of in declaratory order proceedings.” Joint Appeal at 7. *See East West Resort Transp., LLC and TMS, LLC, D/B/A Colorado Mountain Express – Petition for Declaratory Order – Motor Carrier Transp. of Passengers in Colo.*, STB Docket No. MC-F21008 (served June 1, 2005) (issuing subpoena in declaratory order proceeding for “good cause”).

The Board has evaluated a request for a subpoena by balancing the burden on the third party with the need for parties to access relevant information. *See Wis. Power & Light Co. v. Union Pacific R.R. Co.*, STB Docket No. NOR 42051 (served June 21, 2000) (“On balance, we conclude that the proposed discovery has not been shown to be overly burdensome and that the objections have not been shown to be substantial enough to outweigh [the railroad’s] need for potentially relevant information.”); *Ariz. Pub. Serv. Co. & PacifiCorp v. The Burlington N. & Santa Fe Ry. Co.*, STB Docket No. 41185 (served December 23, 2003) (granting subpoena after balancing the relevance to the proceeding with the burden on a third-party).²

In proceedings such as this one, the Board must evaluate the reasonableness of a challenged railroad rule or practice on a case-by-case basis in light of all relevant facts and circumstances. *See Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) (“Granite”); *see also National Grain & Feed Ass’n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993); *Decatur County Comm’rs v. STB*, 308 F.3d 710, 716 (7th Cir. 2002). In order for the Board to be able to perform that analysis, parties must have access to relevant information to build a complete record to be considered by the Board. Where third parties possess that relevant information, the Board may issue a subpoena under 49 U.S.C. § 721 (c); and when the third party is the source of the relevant information, it is even more important for the Board to allow discovery so that it can make a decision based upon a complete and accurate factual record.

Respectfully submitted,



Louis P. Warchot
Counsel for the Association of
American Railroads

cc: Parties of Record

² While the determining factor for the issuance of a third party subpoena is not whether the third party is a member of a trade association, it would not be unreasonable for the Board to consider the third party’s interest in the proceeding—including, as here, where the non-parties are members of a trade association party litigating on behalf of the non-parties—when evaluating the burden on the third parties.